No. 16367

United States Court of Appeals
For the Ninth Circuit

ARTHUR A. ARNHOLD, *et al., Appellants,*

vs.

UNITED STATES OF AMERICA, *et al., Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

BRIEF FOR APPELLEES: Port Angeles and Western Railroad Company, and A. R. Truax, Trustee in Reorganization

WRIGHT, INNIS, SIMON & TODD
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JURISDICTION

The District Court had jurisdiction over the subject matter of and the parties to this action under 28 U.S.C. secs. 1331, 1346(b) and 2671-80, commonly known as the Federal Tort Claims Act (R. 3, 171, 172; Concl. II, R. 236; Find. II, R. 243), with respect to the appellee United States of America, and under 28 U.S.C. sec. 1332 by reason of diversity of citizenship with respect to the other appellees, Fibreboard Products, Inc. and the Port Angeles and Western Railroad Company (hereinafter referred to as the "PAW") and A. R. Truax, Trustee in Reorganization (R. 172; Find. II, R. 228, 229; Concl. II, R. 236).

This court has jurisdiction of the appeal under 28 U.S.C. secs. 1291 and 1294(1).

STATEMENT OF THE CASE

1. History of the Litigation

On March 1, 1954, the district court dismissed the complaint with prejudice with respect only to the appellee United States of America, which dismissal was affirmed by this Court on September 1, 1955. *Arnhold, et al. v. United States,* 225 F.(2d) 650 (1955). The Supreme Court of the United States vacated the judgment of this Court on January 28, 1957 and remanded the case to the district court for trial. *Rayonier Incorporated v. United States,* 352 U.S. 315 (1957).

Some time after the conclusion of trial against all appellees, the district court filed a memorandum opinion on June 23, 1958 (R. 171-205). Thereafter, on July 1, 1958, the district court filed its original findings of fact and conclusions of law (R. 205-215). Pursuant thereto, judgment was entered on July 10, 1958 dismissing the actions of the plaintiffs with prejudice and also dismissing with prejudice the cross-complaint of the United States of America against the PAW.

On July 18, 1958, the appellants filed motions to amend the findings of fact, conclusions of law and judgment (R. 473-479). Thereafter on September 15, 1958, the district court filed amended findings of fact and conclusions of law (R. 227-237). On September 16, 1958, the district court entered an order amending its previously filed memorandum opinion (R. 238-241). Notice of Appeal was filed by the appellants Arnhold, *et al.* on September 19, 1959. The United States of America has not appealed from the dismissal with prejudice of its cross-complaint against the PAW.

2. Questions Presented

Did negligent acts of the PAW with respect to the general condition of its railroad right-of-way proximately cause or contribute to the start or subsequent spread of the Heckleville fire?

Did negligent acts of the PAW, or of the United States of America acting in any way for the PAW, in failing to take proper action to suppress and extinguish the Heckleville fire at its inception, or at any time on August 6 or 7, 1951, proximately cause or contribute to the spread of the fire to the 1600-acre area or proximately cause any damage to the appellants?

Did appellants establish by a preponderance of the evidence that the PAW failed to use ordinary care in any particular other than with respect to the condition of its right of way, namely, in failing to furnish a speeder patrol, in operating a train on August 6, 1951 under conditions then prevailing, and in failing to recognize and remedy the inadequacies of the Forest Service in the fighting of the fire?

3. Summary of the Facts

Appellee PAW generally accepts the summary of the facts as given on pages 2 through 19 of appellants' brief as it applies to the PAW with the exception of certain statements to which PAW objects and to which the following corrections are made:

(a) It is not true, as stated on page 3 of appellants' brief that the PAW refused to take any responsibility for fighting the fire. The testimony of the PAW's gen-

eral manager, Le Gear (Tr. 87) makes it clear that the PAW only declined to acknowledge financial responsibility for the Heckleville fire and when asked whether the PAW wanted to take over the fire, Le Gear indicated that the fire was then on United States property (presumably beyond the right-of-way), that the Forest Service had the men and equipment needed to fight the fire, and that any responsibility of the PAW for the expense could be talked over afterwards. The record shows that the PAW not only lent its active support to the Forest Service personnel in charge of the fire, but that the PAW engaged its men and equipment in the actual fighting of the fire (Tr. 87, 88, 128, 131, 132, 241, 876, 877, 878).

(b) Similarly, it is not accurate to state (pages 4, 5 Arnhold brief) that the PAW did nothing to abate the fire-hazardous conditions along its right-of-way. The record shows clearly that the PAW took all action possible within its limited financial resources to abate and correct fire-hazardous conditions along its right-of-way (Tr. 33, 34, 36, 37, 113, 114).

(c) Appellants' summary of the actions of the train crew (page 6, Arnhold brief) does not clearly bring out that the crew which sighted the smoke of a fire west of Flight just before coming into Fibreboard Camp One did not know whether the fire was on the right-of-way or not but reported it to Snider Ranger Station and were advised that the Forest Service already knew about this fire. It was this fire (apparently the one in section 35) to which the train crew was planning to return and help fight when their engine broke down.

While standing by the telephone and waiting for the repair of the engine, the train crew was not immediately aware of the existence of the Heckleville fire. In fact, they did not discover it until some time after it was reported to District Ranger Floe at 1:00 p.m. by the fire lookout at North Point (Tr. 306, 307, 315, 343, 344, 345).

Other aspects of the evidence which are not mentioned or not placed in proper perspective will be dealt with in connection with subsequent analysis of the findings to which appellants object.

There are several assertions made by the Arnhold appellants which are not fully supported by the record to which we wish to call attention before taking up our general argument:

(a) At page 28 of their brief, appellants suggest that the negligence of the United States with respect to combating the existing Heckleville fire "consisted of creating an unreasonable risk of a fire occurring and escaping to the damage of the plaintiffs." Appellants urge that the trial judge repeatedly so characterized the risks, and in support thereof cite the judge's comment that ". . . a poorly kept right of way would, of course, be more likely to contribute to starting the fire or its spread afterwards" (R. 268) (Arnhold brief, p. 29). The full meaning of this quotation is somewhat different when read in context with the succeeding sentence of the judge's comment:

> ". . . and I recognized in thinking about it exactly in the manner that you have said, that a poorly-

> kept right of way would, of course, be more likely to contribute to starting the fire or its spread afterwards. But I felt that there was not even a scintilla of evidence in this case justifying me in finding as a fact that this fire was causally related to —this fire at Heckelville was causally related to the conditions complained of. (R. 268)"

(b) At page 32 of their brief, appellants declare that "it is clear from the findings that the negligence of defendants continued up to August 10, 1951, at least." There is no indication in the Amended Findings (R. 227-236) that the negligence of the PAW or the United States under Finding XIII related to any date later than August 6th, the first day of the Heckleville fire, or at the latest, August 7th, and it is obvious in the record that it could not. The court clearly found in Finding XVII (R. 235) that "Plaintiffs did not show by a preponderance of the evidence that the defendant United States failed to use reasonable care in mop-up or other firefighting activities after August 7, . . ."

(c) At page 36 of their brief, appellants quote the court's Finding XVIII in part that "The sole proximate cause of the damages to plaintiffs in the amounts stipulated herein was the unforeseeable and fortuitous combination of wind and weather conditions occurring on September 20, 1951" (R. 235-236). In their footnote at the bottom of page 36 of their brief, appellants claim that this finding "falls far short of a finding that the weather conditions were extraordinary or unusual," seemingly ignoring Finding XII of the court (R. 233) holding ". . . . In the early morning of September 20, at some time between midnight and 4:00

a.m., an extraordinary concurrence of high temperature, low humidity and gale-force wind occurred . . .''

SUMMARY OF ARGUMENT

I.

The district judge found that the appellants did not establish by a preponderance of the evidence that negligence on the part of the PAW caused or contributed to the start or subsequent spread of the Heckleville fire (Amended Find. XIII, R. 234). The trial judge went further and found that the sole proximate cause of the damages to appellants was the unforeseeable and fortuitous combination of wind and weather conditions occurring on September 20, 1951 (Amended Find. XVIII, R. 235-236), on which date all of the damages were sustained by appellants. Both of these findings are fully supported by evidence in the lengthy record and should not be disturbed because of the particular evidence cited by the appellants.

II.

No negligence of the PAW was a cause in fact of the damages sustained by the appellants on September 20, 1951, and, consequently, under general principles of law recognized by the State of Washington, the PAW is not liable.

ARGUMENT

The trial court found that none of the damages sustained by the appellants was proximately caused by any negligence of the PAW or of the United States of

America. This decision followed a lengthy trial covering approximately two months, reception of approximately two hundred exhibits, testimony of thirty-three witnesses, and an inspection of the fire area by the trial judge.

Appellants have attacked the following findings:

(1) That it was not shown by a preponderance of the evidence that PAW failed to use ordinary care in any particular other than that stated in Finding XIII (Find. XIV, R. 234).

(2) That it was not established by a preponderance of the evidence that the failure of the PAW and the United States to use ordinary care in maintaining the railroad right of way in a reasonably fire-safe condition proximately caused or contributed to the start or subsequent spread of the Heckleville fire (Find. XIII, R. 234).

(3) That while the United States Forest Service, having taken control of the fighting of the Heckleville fire at its outset, did not exercise reasonable care in its initial attack on the fire, it was not established by a preponderance of the evidence that had such negligence not existed, the fire would have been contained in the 60-acre area, or that there was any causal relationship between that negligence and the ultimate existence of fire in the 1600-acre area (Find. XVI, R. 235-236).

(4) That the United States was not shown by a preponderance of the evidence to have failed to use reasonable care in mop-up or other firefighting actviities or in any other particular after August 7 (Find. XVII, R. 235).

(5) That in the early morning of September 20, at some time between midnight and 4:00 a.m., an extraordinary concurrence of high temperature, low humidity and gale-force wind occurred, causing a flare-up of fire inside the 1600-acre area which thereafter caused appellants' damages (Find. XII, R. 233-234).

(6) That the sole proximate cause of damage to the appellants was the unforeseeable and fortuitous combination of wind and weather conditions occurring on September 20, 1951 (Find. XVIII, R. 235-236).

It is our contention that appellants' attack on the above cited findings should be rejected by this Court since the findings are either compelled by the evidence taken in its entirety, or, in any event, because there is certainly substantial evidence to sustain the reasonableness of the trial judge's findings. The fact that another trier of fact might reasonably have concluded otherwise is not grounds for reversal upon appeal. *United States v. United States Gypsum Co.,* 333 U.S. 364, 365 (1948).

We further contend that the findings compelled the conclusion of the trial judge that neither the PAW nor the United States was liable for the property damage sustained by appellants.

I.

All of the Findings of the Trial Court Challenged by the Appellants Are Well Supported by Evidence in the Record

A. Appellants failed to establish by a preponderance of the evidence that PAW failed to use ordinary care in any particular other than that stated in Finding XIII (Find. XIV, R. 234).

Plaintiff Arnhold *et al.* had alleged seven particular acts of negligence on behalf of the PAW. Three of these particulars related to the maintenance of the PAW right-of-way. The remaining allegations of negligence were in failing to furnish the follow-up patrol under weather conditions then existing contrary to statute; in failing to station fire fighting equipment in sufficient quantity and at proper locations along the right-of-way; in operating its train under the weather conditions then existing without the use of a follow-up patrol and the presence of adequate fire fighting equipment; and, in failing to extinguish the Heckleville fire or to take any steps to extinguish the fires.

Of the aforementioned allegations, the court found the PAW negligent only in regard to its right-of-way maintenance (R. 234), the evidence failing to show the defendant railroad negligent in any other particular (R. 234). These areas in which the court found no negligence will be discussed first.

a. Failure to furnish follow-up patrol in violation of statute.

There was in effect in August of 1951, and there remains in effect today, the following Washington Statute:

"RCW 76.04.260, Locomotives, Steamboilers-Speeder patrols. It shall be unlawful for anyone to operate within one-eighth mile of any forest land during the period April 15 to October 15 inclusive, which period shall be designated as the closed season unless the designated season is extended by the supervisor due to dangerous fire condition: * * *

"(2) Any common carrier railroad trains operating through forest lands unless:

"(a) Such trains are followed by a speeder patrol at such times and in such places as the supervisor may designate, * * *."

The key portion of this statute in relation to defendant railroad is the phrase found in sub-paragraph (2)(a), "at such times and in such places as the supervisor may designate." There is no evidence in the record indicating that the supervisor or anyone else at any time during the summer of 1951, and in particular on or about August 6, 1951, requested or directed that the PAW furnish a speeder or other patrol for its train. Conversely, the record is abundantly clear that no such request nor designation was made (Tr. 54, 57, 120, 121, 163, 164, 166, 167, 170, 171, 266, 286, 292, 470, 1202, 1778, 1779, 4408, 4409, 4538, 4539). As the trial judge said in his memorandum decision, "Plaintiffs in the *Arnhold* case in contending for negligence by PAW as a matter of law for violation of the statute referred to recognize the necessity of the notice specified in the quoted portion of the statute and assert such notice was provided by the general season closure notice, exhibit 27, and by oral notice given in the spring of 1951 at or

shortly before commencement of the fire closure season. Exhibit 27 contains no reference whatever to speeder patrols and there is no preponderance of evidence establishing that in fact oral notice requiring speeder patrols was given. For want of proof of the notice required by the statute violation thereof by PAW is not shown and plaintiff's contention of negligence *per se* in that particular cannot be sustained" (R. 186).

b. *Failure to station fire fighting equipment in sufficient quantity and at proper locations along the right-of-way.*

There is again a lack of evidence supporting the allegation of negligence against defendant railroad. Furthermore, there is no evidence in the record that the fire spread was in any manner occasioned or contributed to by a lack of such equipment. On the other hand, there is ample evidence that the railroad had supplied all equipment required by statute, and that the engines were equipped with proper tools and fire fighting equipment (Tr. 1306).

On a railroad right-of-way which is approximately 55 miles long, including spurs and sidings (Tr. 114), it would appear self evident that well-equipped locomotives, carrying with them a considerable supply of hand tools, in addition to a large supply of water, a pump and hose, provide far greater fire protection than is obtained by the stationing of tools at various points along a right-of-way. The record is clear that all PAW locomotives were equipped in such a manner (Tr. 121, 122, 1306, 3473, 3474).

c. Operation of train under weather conditions existing on August 6, 1951, without the use of follow-up patrol and presence of adequate fire fighting equipment.

Appellants Arnhold *et al.,* having failed to sustain their allegation of negligence on behalf of the PAW for having violated RCW 76.04.260, alleged that even in the absence of a violation of the statute, the PAW was negligent in failing to provide a follow-up patrol in the exercise of reasonable care. Again, referring to the trial court's memorandum decision (R. 186), "Plaintiffs contend, arguendo, that if the speeder control statute was not violated, such patrol was required in the exercise of reasonable care under the existing circumstances. Despite the daily and frequent passage of logging trains in the Heckleville area west of Camp One there is no evidence of any train-caused right of way fire having occurred in that area at any previous time. In the steep grade portions of the right of way east of Camp One, where brakeshoe fires frequently occurred, speeder patrols were regularly provided. If the necessity of speeder patrols in the Heckleville area appeared clearly enough to make their absence a want of due care, the State Supervisor of Forestry and his subordinate, the State Fire Warden, both primarily responsible for enforcement of state law concerning speeder patrols, certainly should and undoubtedly would have given definite and unequivocal notice and demand for speeder patrol in the Heckleville area followed by reasonably frequent and careful checkup on compliance. From the fact that these actions were not taken and because of other circumstances shown in evidence, including the intended but fortuitously pre-

vented immediate return of the engine over the Heckleville area right of way which would have provided as good or better fire patrol than a speeder, findings negativing lack of due care with respect of speeder patrol have been entered."

The court's observations in this regard and its findings entered pursuant thereto are well founded by the evidence contained in the record. First of all, it should be borne in mind that the PAW was a common carrier railroad, and hence, was not free to shut down its operations if and when it chose to do so (Tr. 123, 124). Secondly, the PAW's duty in regard to operation of speeder or follow-up patrol was specifically covered by statute, and was fully complied with as we have seen in sub-paragraph (a) hereof. Thirdly, if the PAW had a duty to supply a follow-up patrol beyond the duty imposed by statute the record is clear that it fulfilled such duty. Again, the PAW right-of-way, including spurs and sidings, was only 55 miles in length (Tr. 114). Its locomotives provided their own follow-up patrol by their activities in retracing their own steps (Tr. 53, 54, 237, 238, 239, 866, 867, 3607, 3608). Had the untimely and unforeseeable breakdown of the 6th of August, 1951, not occurred, engine No. 1347 would have been at the scene of the outbreak of the Heckleville fire within a matter of minutes from the time of its origin.

Fourthly, as pointed out before, engine No. 1347 was well equipped with tools and equipment for fire suppression (Tr. 121, 122, 1306, 3473, 3474), and except for an unforeseeable chain of events, would have been

at the scene of the Heckleville fire within minutes of the fire's origin.

In addition, if we were to assume the PAW negligent in any of these regards, the problem of proximate cause would remain.

d. *Failure to extinguish the Heckleville fire or to take any steps to extinguish the fire.*

It is obvious that the PAW did not extinguish the Heckleville fire. The question is, however, was this due to its negligence? The answer to this question answers the second half of this allegation, that the PAW took no steps to accomplish this.

This allegation assumes as a fact that the fire could have been extinguished on the 6th day of August, 1951, within a reasonable period of time after its being discovered. This, the court has refused to find (R. 234, 281, 292, 293, 294). The court has found that the PAW engine was unable to return to the scene of the Heckleville fire because of mechanical failure, and that the PAW neither ignored nor refused any request for men or equipment to combat the fire (Amended Findings of Fact X, R. 232, 233). The record clearly supports this finding.

The train crew of PAW engine No. 1347 promptly reported the Section 35 fire upon its discovery (Tr. 71, 306, 307, 344, 345). It took prompt and reasonable action to return to the site of the Section 35 fire to actively combat it, being prevented from so doing only by a fortuitous chain of events involving the mechani-

cal failure of the engine (Tr. 307, 308, 311, 312, 315, 346). Upon the necessary repairs being made to the engine, it proceeded to the immediate scene of the Heckleville fire and lent such assistance as was requested (Tr. 191, 192, 193, 194, 195, 315, 316, 317, 318, 349, 350). Thereafter, PAW crews continued to assist in their best capacity, and rendered all assistance requested by the United States Forest Service officer in charge of the fire (Tr. 195, 196, 197, 269, 270, 271, 272, 330, 331, 876, 877, 878, 1305). Therefore, this allegation of negligence falls for failure of proof.

We acknowledge that, under Washington law, an owner or occupant of forest land, such as the PAW with respect to its right-of-way, with knowledge of a fire burning on such land, must exercise ordinary and reasonable care to prevent spread of the fire to the damage of others. Failure to do so is negligence rendering the landowner or occupant liable for all damage proximately resulting therefrom. *Sandberg v. Cavanaugh Timber Co.,* 95 Wash. 556, 164 Pac. 200 (*En Banc* 1917); *Jordan v. Spokane, Portland & Seattle Ry. Co.,* 109 Wash. 476, 186 Pac. 875 (1920); *Galbraith v. Wheeler-Osgood Co.,* 123 Wash. 229, 212 Pac. 174 (1923).

Once the existence of the Heckleville fire was known to the PAW employees, the record is clear, as cited above, that the PAW cooperated promptly and fully with the Forest Service which assumed control and direction of the fighting of the fire. As the trial judge properly observed:

"The final charge of negligence against PAW is that in the exercise of reasonable care PAW ought to have recognized the lack of due care in the fighting of the fire by the Forest Service and that PAW ought to have supplied the deficiency in firefighting. As indicated in the applicable principle of law earlier stated herein, with knowledge of a fire on its right of way, whether caused by its engine or not, PAW had the duty to exercise reasonable care to confine and suppress the fire. However, if it appeared to PAW in the exercise of reasonable care that experienced, competent firefighters were in charge of the fire and apparently taking every reasonable measure to confine and suppress the fire, the mere fact, long later determined, that the firefighting was inadequately or imprudently performed would not justify finding PAW negligent. During the course of the firefighting, both on the right of way and thereafter, a number of highly competent and experienced forest fire fighters were on the scene as participants or observers. There is no evidence that at any time during the long battle any of these experts or any representatives of any plaintiff or anyone else interested in protecting life and property then in jeopardy either condemned, criticized or offered suggestions concerning means or method used in fighting the fire. Under all the circumstances there is a failure of proof of negligence on the part of PAW in the discussed particular." (R. 187-188)

There is no dispute that all but a small portion of the 60-acre area was outside the PAW right-of-way and owned by the United States of America and the appellee Fibreboard Products, Inc., who also owned all of the 1600-acre area. The PAW did not have the equip-

ment, the trained personnel, the requisite authority or the resources with which to undertake fighting any fires outside of its own right-of-way or to pass judgment upon the decisions of the experts employed by the Forest Service.

B. Appellants failed to establish by a preponderance of the evidence that the failure of the PAW and the United States to use ordinary care in maintaining the railroad right-of-way in a reasonably fire-safe condition proximately caused or contributed to the start or subsequent spread of the Heckleville fire (Find. XIII, R. 234).

The only negligence found by the trial court on the part of the PAW was a failure to use ordinary care in maintaining the railroad right-of-way in a reasonably fire-safe condition. Even here the evidence is somewhat inconclusive. As the court said:

> "I recall that among other things this fire was said to have originated at a cut. I recall there was direct evidence and a lot of inference that the conditions in that particular area were much better than they were elsewhere on the right of way. I have commented about that, and I [28] thought I have given due allowance for this factor that you now speak of in saying that I thought the evidence was sufficient in view of the Abrahm's case and others, finding the defendant negligent with respect of the condition at the point of the fire. To tell you the honest truth, in my judgment that borders very closely to speculation, which I continually admonish the juries not to do and which I, at least, ought to be cautious not to do by myself.
>
> "Actually, I don't know anything about the con-

dition of the right of way where this fire started; neither do you or anybody else. Not any of us knows what the condition of the right of way was at the place where the fire first started. We don't even know where the fire first started let alone know what the condition there was, not any of us." (R. 268, 269).

But, for the appellants to prove negligence is not enough to allow them to recover. They must go on to prove that their losses were occasioned, or proximately caused by the negligence thus established. This, as the record shows, and the trial court found, they have failed to do (Amended Find. IX, R. 234). As the court commented during the arguments on the Amended Findings of Fact, "Well, of course, this whole area of the case is a matter that I pondered at great length and in great detail on the subject. It is not something that I hastily or lightly arrived at, however poor the judgment may have been, and I recognized in thinking about it exactly in the manner that you have said, that a poorly-kept right of way would, of course, be more likely to contribute to starting the fire or its spread afterwards. But I felt that there was not even a scintilla of evidence in this case justifying me in finding as a fact that this fire was causally related to—this fire at Heckleville was causally related to the conditions complained of." (R. 268).

The court's finding in this regard and its comments just referred to are well taken. The record indeed contains no evidence (1) that the fire started in any excess of combustible material negligently allowed to accumu-

late on the right-of-way, or (2) that the presence of any such material either contributed to or caused the spread of the fire on the right-of-way to surrounding lands (R. 269).

As the record clearly shows, the weather conditions in the Olympic Peninsula area during the spring and summer of 1951, and particularly the period just preceeding August 6, 1951, were some of the driest and most hazardous ever of record (R. 231, Amended Find. VIII). In fact, the brief of appellants Arnhold, *et al.*, at page three thereof, contains the following language: "The spring and summer of 1951 were among the driest on record in the Sol Duc district. Burning conditions were severe in August of 1951 resulting from below-normal rainfall and less than usual relative humidity.

"The area had been officially described as a region of extra fire hazard for over a month prior to the outbreak of the fire (Finding VII, R. 209)." This being so, the evidence is clear that all railroad right-of-ways are inflammable during periods when weather conditions were as they thus appeared on August 6, 1951 (Tr. 129, 290, 291, 881, 1307, 1308, 1309, 1310, 1315, 1316, 1603, 1604, 1665).

In short, the evidence amounts to and the court simply found that the PAW right-of-way was generally not well kept, but there is no evidence that these conditions, or the PAW's negligence in this respect had any effect on the fire's origin or spread, and to say that the fire wouldn't have started and spread, just as it did, had

this negligence not existed is the purest form of speculation.

It is urged by the appellants Arnhold (Arnhold Brief, pages 22-24) that an eyewitness account of the moment of ignition is not required. We do not deny that in a proper case, the trier of fact *may* infer from circumstantial evidence that a fire started at a particular place and in a particular manner. Thus in the only Washington case cited by appellants on this point, *Abrams v. Seattle & Montana Ry. Co.,* 27 Wash. 507, 68 Pac. 78 (1902), the significant point is that there was sufficient circumstantial evidence to allow the trier of fact to draw the inference that the fire was started by the defendant's railroad locomotive and the further inference that the fire ignited in debris on the right-of-way. The distance between the passing locomotive and the barn was approximately fifty feet, all of which distance was covered by debris, and there was no indication of a strong wind which might have carried the sparks from the locomotive farther away. The court indicated that the question was whether the jury was warranted in its findings and that the questions of the weight and sufficiency of evidence "is usually, if not always, a question for the jury." *Abrams v. Seattle & Montana Ry. Co.,* 27 Wash. 507, at 513, 68 Pac. 78 (1902).

There was no direct evidence as to the precise point where the Heckleville fire started and that any negligent accumulation of combustible material caused or contributed to the start of that fire. No witness had

actual knowledge of the condition of the right of way at the point where the fire started (R. 268, 269).

Actually there was considerable testimony that, in Section 30, conditions were much better than elsewhere on the railroad. For example, the brush was not as heavy or as close to the tracks and the right-of-way was cleared to five or six feet from each side of the roadbed (Tr. 189, 265, 295-296). There had not been any right-of-way fires in that area (R. 186).

The witness Evans who was the first to arrive at the Heckleville fire and was in charge of fighting it during the early hours of the fire on August 6th could not recall specifically that there were rotted or discarded ties on the right-of-way within the fire area (Tr. 1012-1014, 1146-1149, 1315-1316).

There was no evidence that there was an excess of combustible material which should have been removed at the point of origin of the Heckleville fire. Absent this, the trier of fact was justified in not inferring that such an excess of combustible material caused or contributed to the start of the fire. In any event, the trier of fact was not *compelled* to draw such an inference where there was ample evidence, as cited above, that all railroad right-of-ways are inflammable during conditions such as existed on August 6, 1951, and consequently that it was equally or more inferable that an excess of combustible material did *not* cause or contribute to the start of the fire.

Grass grows very rapidly in the area of the Heckleville fire. Even when grass is cut in the spring, the cus-

tomary time for doing so on a properly maintained right-of-way, the grass would grow again rapidly and there would be dry grass and similar materials found on the right-of-way during the summer and fall. Under a normal tie-replacement program on an eight year cycle, approximately one-eighth of the ties would be in various stages of decay (Exhibits 178, A, B, and C; Tr. 3738, 3752-3757, 3806-3808).

Under these circumstances, it was understandable and proper for the trier of fact to conclude that he could not determine with reasonable probability and without inference on inference whether any excess of combustible material on the right-of-way was actually at the initial point of the fire (R. 184-185). The trial judge properly concluded:

> " . . . It simply cannot be determined from the evidence with any degree of certainty or with reasonable probability and without inference on inference where, how or why the fire ignited, nor whether any excess of combustible material on the right of way was actually at the initial point of the fire. For all that appears in the evidence, considering the extremely dry ground conditions and low atmospheric humidity at the time, the hot droppings from the engine might well have started a fire in a sound tie of excellent condition or in little wisps of dried grass or similar material to be found on the right of ways of similar railroads in the area at the time of year in question no matter how well kept up with respect of fire precautions. In these circumstances, causal relationship between the negligence of PAW with respect of the condition of its right of way and the initial igniting and sub-

sequent spread of the Heckleville fire is not established by a preponderance of the evidence." (R. 184-185)

The appellants similarly attack (*Arnhold* Brief, pages 25-27) the trial court's finding that it had not been established by a preponderance of the evidence that the undue accumulation of combustible material on the right-of-way caused or contributed to the spread of the fire. Appellants have not cited any evidence which would *compel* the trier of fact to infer that the fire would not have spread as rapidly had there been only the customary amount of inflammable material in the right-of-way, and not any negligent accumulation.

Under the unusually dry conditions and low humidity prevailing on August 7, as previously pointed out, anything and everything could and did burn, and the trial judge was certainly reasonable in inferring, as he did, that the causative factor of the spread of the fire might well have been these conditions, rather than any negligent accumulation of inflammable material on the right-of-way.

C. Appellants failed to establish by a preponderance of the evidence that there was any causal relationship between the Forest Service negligence in its initial attack upon the 60-acre fire and the ultimate existence of fire in the 1600-acre area (Find. XVI, R. 234-235)

It is important to direct attention to the language of Finding XVI in its amended form, particularly to the last sentence thereof which was added by the judge following the argument of appellants' motion to amend the findings when the judge observed:

"I am concerned with whether I have used the right language to express what I found and believed. I am satisfied that the Forest Service in what I call 'the initial fire period,' August 6, 7, did not act as promptly and fully and effectively as reasonable care required. . . . In my judgment, whether that negligence was the cause of the fire escaping and ultimately being in the 60-acre area and the 1600-acre area, is a matter of speculation.

"In my judgment, under the evidence and considering the conditions existing at the time, it is impossible for me or anyone else to say that the fire could have been contained or suppressed even with the ultimate action by the Forest Service during that period. I will readily agree that one person might think that the fire could have been contained and even put out. But I think there is a reasonable inference from the evidence for another reasonable mind to conclude that it couldn't have been under the conditions existing at that time considering the extremely difficult and hazardous conditions with respect of fire in existence at that time.

"Now, in my opinion, the Forest Service people were negligent in that respect, but there is no showing that there is any causal relationship between that and the ultimate existence of fire in the 1600-acre area. [55]

"If anything I have said in the findings seems to conflict with this, it is a matter of mistaken wording or language. . . . " (R. 292-293)

Accordingly Amended Finding XVI now reads in its entirety:

"XVI.

"District Ranger Floe and his subordinates,

acting within the scope of their duties as officers and employees of the United States, failed to act as promptly, vigorously and continuously as they were required to do in the exercise of ordinary care in attacking the Heckleville spot fire and in attempting to confine it to the 60-acre area. Whether, or at what time and place, the fire might have been contained or suppressed within said area but for such negligence is a matter of speculation and cannot be determined as a reasonable probability under the evidence. It has not been established by a preponderance of the evidence that had such negligence not existed, the fire would have been contained in the 60-acre area, or that there is any causal relationship between that negligence and the ultimate existence of fire in the 1600-acre area." (R. 234-235)

There is ample evidence in the Record to sustain the reasonableness of the trial court in making Finding XVI.

There was extensive testimony which was not consistent with regard to how many men and how much equipment would have been sufficient to contain the fire at various times after it was first reported at 1:00 p.m. on August 6th, but the court did not find that District Ranger Floe knew or should have known that any particular number of men or particular amount of equipment would be sufficient. The witnesses themselves and the court recognized that such judgments with respect to how many men or how much equipment would be sufficient might be the product of hindsight (Tr. 1045, R. 195-196).

Since the opinion of the experts differed with respect

to how much equipment and how many men would have been required to suppress the fire at various times on August 6 and 7, the court was justified in determining what weight to give to such testimony (Tr. 2393, 2436, 2445, 2592-2594, 2651).

D. Appellants did not establish by a preponderance of the evidence that the United States failed to use reasonable care in mop-up or other fire-fighting activities, or in any other respect after August 7 (Finding XVII, R. 235).

There was ample evidence to support this finding that there was no negligence on the part of the United States after August 7. Actually appellants' own witnesses agreed that the Forest Service did an excellent job on August 8th through 10th until the fire was controlled on the 1600-acre area (Tr. 2905, 3068).

After August 10th, mop-up continued (Tr. 1490-1502; 3679), inspections were made, and fires which flared up were extinguished (Tr. 1108-1109, 1217-1220, 1222-1223). The evidence with respect to the effectiveness and desirability of a night patrol on the night of September 19 was conflicting (Tr. 2526-2527, 2667, 2957-2958, 1597, 1773-1775, 1795, 2096, 3599-3600).

Contrary to the contention of appellants, the preponderance of the evidence was that the fire of September 20 did not come from L-1 (Tr. 1535-1537, 2082-2083, 4089, 4299-4300).

Appellants urge that because the fire on September 20th came from the 1600-acre area, this was conclusive evidence that the Forest Service was negligent in

mopping up the fire. The evidence showed, however, that mop-up is difficult in such terrain, and that a fire may smolder throughout the heavy rains of the winter (Tr. 1100-1101, 3993-3996, 883, 2406).

The court understandably recognized that it was common and accepted practice, as followed by the Forest Service in this instance, to keep the area under surveillance by daytime patrol, to suppress smokes and flareups as they occurred, and to wait for the heavy rains of late September and October to quench the fire (R. 198-199).

E. The court was justified in finding that an extraordinary concurrence of high temperature, low humidity and gale-force wind occurred on September 20, causing a flare-up of fire inside the 1600-acre area (Find. XII, R. 233) and that these conditions were unforeseeable and fortuitous (Find. XVIII, R. 236).

While there was lengthy testimony and numerous exhibits with reference to the weather conditions immediately preceding September 20 and on September 20, this evidence did not establish that the combination of weather conditions actually experienced on September 19-20 were to be expected or were reasonably foreseeable. The last weather forecast received on the evening of September 19th by the Forest Service indicated:

> "Olympic - Mt. Baker Districts: Thursday: Patches of fog during early morning, otherwise high scattered to broken clouds. Little change in temperature. Humidity about 10% lower, with minimium near 30%. Winds northeasterly 12 to 16 exposed areas." (Exh. 44; Tr. 1596)

Under then accepted terminology (Exh. 104; Tr. 3325), the weather predicted was to be expected in the middle of the afternoon of September 20, at which time the highest wind velocity of 16 miles per hour and the lowest humidity of about 30% could be anticipated (Tr. 1596-1597, 3322-3323, 3379). The forecast of fog indicated the prospect of a cool night without appreciable wind (Tr. 1594, 1596-1597, 1938, 3322-3323, 3379-3380).

There were a number of witnesses to the weather conditions of September 19-20 to whose testimony the court was entitled to give great weight, and their testimony clearly supports Findings XII and XVIII.

Petrus Pearson, a resident of Western Washington for 49 years, testified that the wind that morning was 30 to 35 miles per hour (Tr. 2078, 4498), and graphically described the situation:

> "I had a tin hat on. . . . I had to hold on to that to keep it on. The wind was picking up sharp bits of gravel and throwing it in your face with a stinging sensation, and there was things rolling around on the road, and the dust was flying. . . I never [in September] saw a northeast wind blow that hard or a east wind." (Tr. 2104)

State District Warden McDonald who was at the fire scene at about 4:00 a.m. on September 20, estimated the wind at 32 to 38 miles per hour (Tr. 1743). Winds of 39 miles per hour and over are classified as gale-force winds on the Beaufort's Wind Scale (Exh. 164).

The state lookout at Gunderson who reported the fire

at 3:15 a.m. on the 20th, estimated the wind at about 40 miles per hour and said that his lookout tower was "rattling and weaving" (Tr. 3291).

Another witness, James Anderson, who had several years' experience taking wind recordings on an anemometer, testified that the wind was 35 to 45 miles per hour and much stronger at times at 5:30 a.m. and 7:00 a.m. on the 20th in the Calawah area and at Hyas Ridge (Exh. 108). These points were 9 to 10 miles southwest of the 1600-acre area. He was concerned that the wind would blow trees across the road and block him from escaping the fire. He considered the wind the strongest wind he had ever seen on the Olympic Peninsula during a fire season (Tr. 3209-3213, 3215, 3218-3220, 3230-3231).

II.

Under the Findings of the District Court, the Negligence of the PAW Was Not a Cause in Fact of Appellants' Damage

As plaintiffs, appellants had the burden of proof to establish by a fair preponderance of the evidence both negligence as charged and proximate causal relationship of such negligence to claimed damage. In doing so, substantial evidence and not a mere scintilla is required, as pointed out by the trial court (R. 181). *Carley v. Allen,* 31 Wn.(2d) 730, 198 P.(2d) 827 (1948); *Wilson v. Northern Pacific Railway Co.,* 44 Wn.(2d) 122, 265 P.(2d) 815 (1954); *Evans v. Yakima Valley Transportation Co.,* 39 Wn.(2d) 841, 239 P.(2d) 336 (1952).

Abstract negligence which is not shown to be the

proximate cause of damage will not sustain a finding of liability. Prosser on Torts (2d ed., 1955), pp. 218-220.

Proximate cause is defined as that cause which, in a natural and continuous sequence, unbroken by any new, independent cause, produces the damage, and without which the damage would not have occurred. *Squires v. McLaughlin,* 44 Wn.(2d) 43, 47, 265 P.(2d) 265 (1953); *Burr v. Clark,* 30 Wn.(2d) 149, 157, 190 P.(2d) 769 (1948).

The Washington Supreme Court holds that before any question of proximate cause can arise, it must be shown that the negligence found was the cause in fact.

> "There is, of course, a distinction between an actual cause, or cause in fact, and a proximate, or legal, cause.
>
> "An actual cause, or cause in fact, exists when the act of the defendant is a necessary antecedent of the consequences for which recovery is sought, that is, when the injury would not have resulted 'but for' the act in question. But a cause in fact, although it is a *sine qua non* of legal liability, does not of itself support an action for negligence. Considerations of justice and public policy require that a certain degree of proximity exist between the act done or omitted and the harm sustained, before legal liability may be predicated upon the 'cause' in question. It is only when this necessary degree of proximity is present that the cause in fact becomes a legal, or proximate, cause."
>
> *Eckerson v. Ford's Prairie School Dist. No. 11,* 3 Wn.(2d) 475, 482, 101 P.(2d) 345 (1940);

Guerin v. Thompson, 53 Wn.(2d) 515, 519, 335 P.(2d) 36 (1959).

Applying the above principles, the trial judge did not find it necessary to decide whether the weather conditions on the morning of September 20 were an intervening, superseding cause or a concurring cause, and consequently appellants' discussion of these concepts is pointless. As of September 20, no negligence of the PAW or the United States, or of anyone else, was in existence for the weather conditions of September 20 to supersede, or to make possible any intervening or concurring cause.

Under the findings of the court previously discussed, the only negligence of the PAW (or of the United States) relating to the condition of its right-of-way did not contribute to the start or spread of the Heckleville fire. Similarly, the only negligence of the United States relating to the initial attack on the fire in its 60-acre area on August 6 and 7 did not contribute to the presence of fire in the 1600-acre area. Consequently, as of September 20, the presence of any fire in the 1600-acre area was not the result of any negligence of either the PAW or the Forest Service, and there was no continuing risk created by either.

The cases cited by appellant on this issue all involve negligence which was an actual cause of the damage and the question was whether the actual cause was a proximate cause. In the instant case the trial judge did not find as a fact that the negligence of the PAW or the Forest Service was responsible for the presence of fire

in the 1600-acre area and, therefore, an actual cause of appellants' damage.

For example, *Johnson v. Kosmos Portland Cement Co.,* 64 F.(2d) 193 (6th Cir. 1933), involved the negligence of a defendant who failed to clean an oil barge thus creating a continuing risk of explosion which was ignited by lightning. In *Theurer v. Condon,* 34 Wn. (2d) 448, 209 P.(2d) 311 (1949), a fire hazard created by the negligent installation of an oil burner in 1937 continued until 1944 when other negligence concurred with it to cause a fire. In *Seibly v. Sunnyside,* 178 Wash. 632, 35 P.(2d) 56 (1934), the negligence of the city in burning weeds along a highway during a high wind was a cause in fact of the damages to a truck and the only question was the concurrent negligence of the driver in driving through, which did not relieve the city, the two tort feasors being jointly and severally liable. Similarly, in *Tope v. King County,* 189 Wash. 463, 65 P.(2d) 1283 (1937), the county's negligence in casting water upon the lands of others was a cause in fact of the damages resulting from an act of God (a flood) which would not have damaged the plaintiffs but for the county's negligence. In *Teter v. Olympia Lodge No. 1, I.O.O.F.,* 195 Wash. 185, 80 P.(2d) 547 (1938), the negligence, consisting of allowing the wall of a burned out building to remain standing, was the actual cause of the damage to plaintiffs, and created a continuing risk with which wind concurred to cause damage.

Appellants' arguments regarding foreseeability and remoteness are irrelevant until there has been a prior

determination that any negligence found is a cause in fact of the damage — only then does the court have to determine the question of proximate cause.

Upon the basis of the trial court's findings, the only negligence of the PAW and the Forest Service was not a cause in fact of appellants' damage, and consequently there was no negligence to be "superseded." The court went on, however, to find:

> " . . . In the early morning of September 20, at some time between midnight and 4:00 a.m., an extraordinary concurrence of high temperature, low humidity and gale-force wind occurred, causing a flare-up of fire inside the 1600-acre area, which quickly spread out of control onto Fibreboard land to the south and west. From there it moved rapidly and at times by great jumps for a distance of 20 miles in a southwesterly direction to and within the town of Forks causing damage to the property of plaintiffs." (Find. XII, R. 233-234)

> " . . . The sole proximate cause of the damages to plaintiffs in the amounts stipulated here was the unforeseeable and fortuitous combination of wind and weather conditions occurring on September 20, 1951." (Find. XVIII, R. 235-236)

Since the trial court was unable to find any negligence on the part of the PAW or the Forest Service with respect to the breakout of the fire on September 20, it did not find it necessary to discuss or decide "whether the strong wind, the high temperature, the low humidity, or the concurrence of the three during the night in question, was an Act of God as that term is meant in law" (R. 201).

III. Under Washington law the PAW is not liable for damages resulting from the fire that originated upon and escaped from its right-of-way.

None of the cases cited by appellants in their brief (Arnhold Brief. pages 45-48) involve all of the factual elements present in the instant case, and, accordingly, it is meaningless for appellants to contend (Arnhold Brief, p. 45) that "The negligence found against the PAW has always been deemed sufficient grounds for recovery against railroads."

Any question of negligence in the release of fire igniting material by the PAW has been removed from this case. As the court observed in its Memorandum Opinion, "It is not alleged by plaintiffs nor is there evidence showing that the release from the engine of fire igniting material was due to negligence" (R. 175).

All of the cases cited by appellants on pages 45-46 of their brief were jury cases. *Jordan v. Welch,* 61 Wash. 569, 112 Pac. 656 (1911); *Abrams v. Seattle & Montana Rwy. Co.,* 27 Wash. 507, 68 Pac. 78 (1902); *Jordan v. Spokane, Portland & Seattle Ry. Co.,* 109 Wash. 476, 186 Pac. 875 (1920); *McCann v. Chicago, Milwaukee & Puget Sound R. Co.,* 91 Wash. 626, 158 Pac. 243 (1916); *Slaton v. Chicago, Milwaukee & St. Paul Railway Co.,* 97 Wash. 441, 166 Pac. 644 (1917).

Thus *Jordan v. Welch* involved a jury verdict affirmed on appeal, and the appellate court observed, at page 572, "This negligence in no way involved any defect in the engine, or any negligent manner of operation, except as the jury *might* (emphasis added) have

held that discharging live coals upon the right of way under the circumstances was 'negligent operation'." There is no suggestion that the jury was *compelled* to so hold as a matter of law, and the *Welch* case has only been cited once by the Washington Supreme Court in a fire case where it was cited for the proposition that an owner or occupier of land is required to use reasonable care to prevent fire from spreading from his own land. *Criscola v. Guglielmelli,* 50 Wn.(2d) 29, 31, 308 P.(2d) 239 (1957). In the instant case the trier of fact chose to find otherwise than a jury *might* have found.

The *Abrams* case also involved a jury verdict affirmed upon appeal, and the inflammable debris was deposited not only upon the railroad right-of-way, but also between the right-of-way and plaintiff's barn, and there was evidence of previous fires in the very same debris after the passage of other trains. The court observed that "the jury were *privileged* (emphasis added) to make up their verdict from that part of the evidence most favorable to the contention of the respondent," (*Abrams* case, p. 510) and that "It is not a question of no evidence, but one of the weight and sufficiency of evidence; and this is usually, if not always, a question for the jury" (*Abrams* case, p. 513).

In *Jordan v. Spokane, Portland & Seattle Railway Company,* the court reversed a nonsuit granted at the close of plaintiff's case upon the grounds that there was evidence from which a jury *might* find that the railroad was negligent in failing to take reasonable means to prevent the escape and spread of a fire after the railroad knew of the fire's existence.

In the *McCann* case, there was again a jury verdict for the plaintiff and the question upon appeal was whether there was sufficient evidence to entitle the plaintiff to go to the jury, but there is no suggestion that the jury was compelled to find for the plaintiff.

In the *Slaton* case, a jury verdict for the plaintiff was sustained, and the court was concerned with the admissability of evidence (evidence of other fires from which inferences might be drawn as to knowledge toleration of a right-of-way condition) and whether a jury *might* infer that an oil burning engine could cause a fire, the question of preponderance of the evidence on this point being for the jury to decide.

It may be that historically the Washington court has been willing to allow considerable latitude in the amount of evidence required to take a railroad fire case to the jury, and in *allowing* the jury to draw inferences even from limited circumstantial evidence. But this does not mean that the trier of fact, whether jury or judge, is relieved of its duty and right to draw the inferences and make the findings based upon the evidence, and, particularly, to determine whether the plaintiff has sustained the burden of establishing a fact by a preponderance of the evidence.

In effect, appellants are basically appealing from numerous findings of fact made by the court after a lengthy trial in which there was extensive evidence, and the suggestion that other triers of fact *might* have found otherwise is not grounds for reversal, and appellants' contention that the court was *compelled* to find in their favor is without merit.

For the foregoing reasons, we respectfully submit that the judgment below should be affirmed.

Dated this 23rd day of February, 1960.

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